Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LAMBERT, SUPERINTENDENT,
WASHINGTON STATE PENITENTIARY,

Petitioner,

v.

GARY BENN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under 28 U.S.C. § 2254(d)(1), as interpreted by *Williams v. Taylor*, 529 U.S. 362 (2000), a federal court must grant deference to the state court adjudication of federal law. The federal court may not grant habeas relief unless the state court adjudication of the merits of a claim constituted an objectively unreasonable application of clearly established federal law. Did the Ninth Circuit grant the deference required by § 2254(d)(1) when the court simply disagreed with the conclusions of the Washington Supreme Court?

PARTIES

The Petitioner is John Lambert, the Superintendent of the Washington State Penitentiary. The Respondent is Gary Benn.

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PETITION

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 283 F.3d 1040 (9th Cir. 2002) (App. 1a-39a). The opinion of the United States District Court for the Western District of Washington is unpublished. (App. 40a-56a). The opinion of the Washington Supreme Court affirming Benn's convictions and death sentence on direct appeal is reported at 120 Wash.2d 631, 845 P.2d 289 (1993) (App. 57a-223a). The opinion of the Washington Supreme Court denying Benn's collateral challenge is reported at 134 Wash.2d 868, 952 P.2d 116 (1998) (App. 224a -391a).

JURISDICTION

The court of appeals entered judgment on February 26, 2002. (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> nor shall any State deprive any person of life, liberty, or property, without due process of law....

28 U.S.C. § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States....

STATEMENT

This case involves the claim that the prosecution withheld exculpatory impeachment evidence in violation of Benn's right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963). The case raises issues concerning the measure of deference a federal court must apply to the state court's decision that the undisclosed evidence was not material because the witness and the issue to which the evidence related were not critical to the prosecution's case. In this case, while the Ninth Circuit cited to the correct standard of review, the circuit court did not apply the deference required by the statute. Rather, the Ninth Circuit merely disagreed with the Washington Supreme Court's decision.

1. The State's Case Against Benn

Benn was convicted of aggravated first degree murder and sentenced to death for the 1988 killings of Jack Dethlefsen and Michael Nelson. *State v. Benn*, 120 Wash.2d 631, 638-39, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993) (App. 78a-79a). Benn committed the crimes by killing the two men, with premeditation, as part of a common scheme or plan. *Id.* at 647

(App. 96a). The Washington Supreme Court's summary of the extensive evidence of Benn's guilt is set forth in the court's opinion affirming the convictions and sentence on direct appeal. *Id.* at 639-48 (App. 79a-97a).

The evidence showed Benn had shot each man in the chest, and then shot both men in the head at point blank range as they lay face down on the floor. *State v, Benn*, 120 Wash.2d at 639-43 (App. 79a-89a); *In re the Personal Restraint Petition of Benn*, 134 Wash.2d 868, 895-96, 952 P.2d 116 (1998) (App. 288a-89a). Benn initially denied involvement in the murders, but later confessed to numerous individuals, including his own brother, that he killed the two men. *State v. Benn*, 120 Wash.2d at 640-43 (App. 81a-89a); In *re Benn*, 134 Wash.2d at 879 (App. 255a). At trial, defense counsel conceded Benn had killed the two men, but counsel planned to present a claim of self-defense. *In re Benn*, 134 Wash.2d at 879 (App. 255a). This plan failed when Benn refused to testify in his own defense. *Id.* at 894-95 (App. 285a-88a). Absent Benn's testimony, the defense could not establish a claim of self-defense. *Id.* at 895 (App. 287a-88a). Even if he had testified, however, the Washington Supreme Court found Benn could not have presented a plausible claim of self-defense in light of the fact that Benn shot the two unarmed men as they lay wounded on the floor. *Id.* at 895-96 (App. 288a-89a). The Washington Supreme Court stated:

> In fact, both victims were shot in the back of the head, while lying face down on the floor, after being shot in the chest. The physical evidence proved victim Dethlefsen was either sitting on the couch or just beginning to stand when he was shot in the chest from several feet away. He was not shot during a struggle over a gun. The defendant notes that both victims were lying facing the gun cabinet and that victim Dethlefsen apparently broke the cabinet before he fell or as he was falling. The

> defendant infers from the victim's location and the condition of the gun cabinet that victim Dethlefsen was attempting to get a gun. Regardless of how or where the bodies fell, the reason they fell is that the defendant shot them in the chest while they were unarmed. The defendant has no lawful excuse or justification for firing the second shots into the already mortally wounded men's heads.

In re Benn, 134 Wash.2d at 895-96 (App. 288a-89a).

The prosecution presented overwhelming evidence of Benn's guilt. Police officers found Benn alone with the victims' bodies. *State v. Benn*, 120 Wash.2d at 639 (App. 79a-80a). Benn denied being near the bodies, but the officers discovered a bloody boot print next to one victim, Nelson, that matched the sole of Benn's boot. *Id.* at 639-40 (App. 80a-81a). Experts testified the bloody boot print and high velocity blood spatter on Benn's boot showed Benn stood next to Nelson as Benn shot him in the head. *Id.* at 642-43 (App. 86a-87a).

The medical examiner, Dr. Howard, testified that each victim had a gunshot wound entering the chest and exiting the back, and each had a gunshot wound to the back of the head or neck entering from the rear and exiting from the front. *State v, Benn*, 120 Wash.2d at 640 (App. 81a-82a). Dr. Howard opined that the victims had been shot first in the chest, and then in the head. *Id.* (App. 81a-82a). Based upon the physical evidence, Dr. Howard testified that Dethlefsen was sitting on the couch when Benn shot him in the chest from several feet away. *In re Benn*, 134 Wash.2d at 895 (App. 288a). After being shot in the chest, the two men fell to the floor. Benn then shot each man in the head, at point blank range, as they lay face down on the floor. *In re Benn*, 134 Wash.2d at 895 (App. 288a); *State v. Benn*, 120 Wash.2d at 640-43 (App. 81a-87a).

The prosecution presented three alternative motives for the killings: (1) Benn feared the victims would report his involvement in an insurance fraud scheme involving a burglary and fire of his trailer; (2) Benn was angry that Dethlefsen had removed Benn from his will; and (3) Benn believed Dethlefsen was harassing Benn's former girlfriend. *In re Benn*, 134 Wash.2d at 879 (App. 255a-56a). In addition to the forensic evidence, the prosecution presented several witnesses in support of these theories.

Benn's brother testified about Benn's various admissions regarding the killings. *State v. Benn*, 120 Wash.2d at 641-42 (App. 84a-85a); *In re Benn*, 134 Wash.2d at 907 (App. 311a-13a). Benn told his brother "quite a few" different versions of his activities on the day of the murders before Benn eventually admitted to killing the victims. *State v. Benn*, 120 Wash.2d at 642 (App. 85a). In admitting to the murders, Benn told his brother "'that he had claimed way more than he should have in connection with his insurance claim in the fire situation. . . ." *In re Benn*, 134 Wash.2d at 898 (App. 294a). The insurance adjuster also testified about the claim Benn made against the insurance policy. *In re Benn*, 134 Wash.2d at 899 (App. 295a). Several witnesses, including Benn's brother, testified that items claimed to have been lost were later found undamaged. *In re Benn*, 134 Wash.2d at 899 and 918 (App. 295a-96a and 333a).

Benn also told his brother that Dethlefsen had been harassing his ex-girlfriend, and that he and Dethlefsen argued about it just before Benn killed him. *State v. Benn*, 120 Wash.2d at 641 (App. 84a). William Hastings testified that he and another man, not Benn, were beneficiaries under Dethlefsen's will. *In re Benn*, 134 Wash.2d at 908 (App. 313a). The prosecution also presented evidence of Benn's prior attempt to hire someone to kill Dethlefsen. Walter "Pete" Hartman testified that Benn asked him to kill Dethlefsen. *State v. Benn*, 120 Wash.2d at 644 (App. 89a); *In re Benn*, 134

Wash.2d at 908 (App. 313a). Denver Carter's testimony corroborated Hartman's testimony. *State v. Benn*, 120 Wash.2d at 642 and 644 (App. 86a and 90a).

In addition, Roy Patrick testified about the admissions Benn made to him while they were detained in the Pierce County Jail. *State v. Benn*, 120 Wash.2d at 640-41 (App. 82a-84a). Benn provided Patrick with details of the crime that only the killer would know, including drawing diagrams (one of which had Benn's fingerprints on it) showing the position of the victims at the moment they were shot. *Id.* at 641 (App. 83a). Benn also told Patrick about his role in the insurance scam. *Id.* (App. 84a). Benn also asked Patrick to find someone to take the blame for the murders and to kill Pete Hartman. *Id.* at 644 (App. 89a-90a). The Washington Supreme Court found that other evidence corroborated Patrick's testimony. *In re Benn*, 134 Wash.2d at 937-38 (App. 372a-74a).

2. State Court Procedural History

The Washington Supreme Court affirmed Benn's convictions and sentence on direct appeal. *State v. Benn*, 120 Wash.2d at 694-96 (App. 187a-92a). This Court denied Benn's petition for a writ of certiorari. *Benn v. Washington*, 510 U.S. 944 (1993). Following direct appeal, the Washington Supreme Court appointed new counsel for the purpose of filing a personal restraint petition. *In re Benn*, 134 Wash.2d at 880 (App. 256a). The court also authorized discovery and funding for an investigation and an expert. *Id.* (App. 256a).

Benn filed the petition, alleging *inter alia* that the prosecution failed to disclose exculpatory evidence concerning Roy Patrick and the cause of the fire at Benn's trailer. *In re Benn*, 134 Wash.2d at 880 (App. 256a-57a). The Washington Supreme Court transferred the matter to the Pierce County Superior Court for an evidentiary hearing. *Id.* at 882 (App. 261a).

The superior court ultimately heard testimony from about 50 witnesses. *Id.* at 883 (App. 262a). The superior court entered detailed findings of fact, answering the three specific questions framed in the remand order. *Id.* at 883-84 (App. 263a-65a).

Following the evidentiary hearing, the Washington Supreme Court denied Benn's petition. *In re Benn*, 134 Wash.2d at 879 (App. 254a). The court held that Benn had no plausible claim of self-defense. *Id.* at 895-96 (App. 287a-89a). In light of the overwhelming evidence of Benn's guilt, the court determined Patrick was not a significant witness in the prosecution's case. *Id.* at 904, 906-08 and 915 (App. 305a, 310a-13a, and 327a-28a). The court also held that the cause of the fire was not critical to the prosecution's case. *Id.* at 900 (App. 297a). Even if the fire was accidental, substantial evidence supported the insurance fraud theory, and the insurance fraud scheme was only one possible motive for the murders. *Id.* at 898-900 and 915-18 (App. 293a-97a and 329a-35a). Because Patrick and the cause of the fire were not critical to the prosecution's case, the undisclosed evidence was not material.

3. Federal Habeas Corpus Proceedings

Benn filed his habeas corpus petition in 1998. Among other things, Benn alleged the prosecution withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Respondent answered the petition and, following discovery, both parties moved for summary judgment. On June 30, 2000, the Honorable Franklin D. Burgess, United States District Judge granted Benn's motion for summary judgment. (App. 40a-56a). Finding that the prosecution had withheld material exculpatory evidence, the district court vacated Benn's convictions. (App. 56a). The district court did not reach the remaining claims raised in Benn's petition. (App. 56a).

The State appealed. The Ninth Circuit issued its opinion on February 26, 2002, affirming the order granting Benn's petition. In affirming the district court, the Ninth Circuit rejected the Washington Supreme Court's conclusion that Patrick and the cause of the fire were not critical to the prosecution's case. *Benn v. Lambert*, 283 F.3d at 1059 and 1060 (App. 30a-32a).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that the Washington Supreme Court reached an objectively unreasonable conclusion when the state court determined the undisclosed evidence was not material. The Ninth Circuit rejected the Washington Supreme Court's determination that Patrick and the actual cause of the fire were not critical to the prosecution's case. In doing so, the Ninth Circuit failed to provide any deference to the Washington Supreme Court's determination of what evidence is critical in proving aggravated murder under Washington law.

1. Under 28 U.S.C. § 2254(d)(1), The Federal Courts Must Defer To The State Court's Application Of Federal Law To The Facts.

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), "a federal habeas court owed no deference to a state court's resolution of such questions of law or mixed questions." *Williams v. Taylor*, 529 U.S. 362, 400 (2000) (opinion by O'Connor, J.). While the federal courts would "give great weight to the considered conclusions of a coequal state judiciary", the federal courts were not bound by state court conclusions on federal law. *Miller v. Fenton*, 474 U.S. 104, 112 (1985). In 1991, in granting certiorari in *Wright v. West*, 502 U.S. 1021 (1991), the Court asked the parties to address in their briefs whether a federal habeas court should give deference to the state court's conclusion on mixed questions of law and fact. *Williams*, 529 U.S. at 400. Although the Court's ultimate decision did not

turn on the answer to that question, the Court's several opinions debated whether a federal court should apply a deferential standard of review to state court decisions on mixed questions. *Id.* (citing *Wright v. West*, 505 U.S. 277 (1992)).

In 1996, the AEDPA answered the debate and "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Williams*, 529 U.S. at 399. Rejecting the argument that the AEDPA did not alter the *de novo* standard of review, the Court held the AEDPA did more than merely express the rule that federal courts should give "great weight to the considered conclusions of a coequal state judiciary." *Id.* at 403. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. The federal court may grant habeas relief only if the state court application of federal law was unreasonable. *Id.*

"[A] state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams*, 529 U.S. at 407. "The term 'unreasonable' is no doubt difficult to define." *Id.* at 410. The term certainly means more than merely an incorrect or erroneous application of the federal law. *Id.* at 410-12. On the other hand, the term does not require an "all reasonable jurists" standard such that a decision is unreasonable only if all reasonable jurists would agree it is unreasonable. *Id.* at 409-10. In *Williams*, the Court determined that the term means "objectively unreasonable". Thus, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

The Ninth Circuit has determined that the "objectively unreasonable" standard is equivalent to the "clearly erroneous" standard employed for reviewing findings of fact. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-55 (9th Cir.), *cert. denied*, 121 S. Ct. 340 (2000). If "clear error" occurred, the state court decision is objectively unreasonable. *Id.* at 1153-54.

Although the Ninth Circuit acknowledges the existence of the "objectively unreasonable" standard, the circuit court's application of this standard demonstrates that the court does not actually defer to the state court adjudication of federal law. Despite the enactment of the AEDPA, the Ninth Circuit's trend in granting habeas relief in capital cases remains unchanged.

2. The AEDPA Has Not Altered The Ninth Circuit's Practice Of Routinely Granting Habeas Relief In Capital Cases.

Since January of 1999, the Ninth Circuit has issued 23 published opinions involving the final disposition of a first habeas corpus petition filed by a capital defendant. Of those 23 cases, pre-AEDPA law governed 20 cases and the AEDPA governed 3 cases. Despite the enactment of a statutory deferential standard of review, the Ninth Circuit has continued its trend of granting the writ, or affirming the district court's order granting the writ, in a majority of the cases.

In the pre-AEPDA cases, the Ninth Circuit granted the writ sixteen times. *See Jennings v. Woodford*, No. 00-99008, 2002 WL 960025 (9th Cir. May 10, 2002) (vacated conviction); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (reversed sentence); *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002) (reversed sentence), *cert. petition filed*, ___ S. Ct. ___ (2002); *Ghent v. Woodford*, 279 F.3d 1121 (9th Cir. 2002) (reversed sentence); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (reversed sentence and remanded for evidentiary hearing concerning guilt phase claims); *Garceau v. Woodford*, 275

F.3d 769 (9th Cir. 2001), *reh'g. denied*, 281 F.3d 919 (2002) (reversed conviction); *Morris v. Woodford*, 273 F.3d 826 (9th Cir. 2001) (reversed sentence), *cert. petition filed*, ___ S. Ct. ___ (2001); *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (reversed sentence); *Ainsworth v. Woodford*, 268 F.3d 868 (9th Cir. 2001) (reversed sentence); *Murtishaw v. Woodford*, 255 F.3d 926 (9th Cir. 2001) (reversed sentence), *cert. denied*, 122 S. Ct. 1313 (2002); *Odle v. Woodford*, 238 F.3d 1084 (9th Cir. 2001) (granted conditional writ pending competency hearing), *cert. denied*, 122 S. Ct. 201 (2001); *Sandoval v. Calderon*, 241 F.3d 765 (9th Cir. 2000) (reversed sentence), *cert. denied*, 122 S. Ct. 112 (2001); *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000) (reversed sentence), *cert. denied*, 531 U.S. 1072 (2001); *Coleman v. Calderon*, 210 F.3d 1047 (9th Cir. 2000) (reversed sentence), *Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (reversed sentence), *cert. denied*, 531 U.S. 952 (2000); *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999) (reversed conviction), *cert. denied*, 528 U.S. 1198 (2000). The Ninth Circuit affirmed the conviction and sentence in only four of the pre-AEDPA cases. *See Pizzuto v. Arave*, 280 F.3d 949 (9th Cir.), *mandate stayed*, 280 F.3d 1217 (2002); *Anderson v. Calderon*, 276 F.3d 483 (9th Cir. 2001); *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001); *Rich v. Calderon*, 187 F.3d 1064 (9th Cir. 1999), *cert. denied*, 528 U.S. 1092 (2000).

With the enactment of the AEDPA, and the "new restrictions" placed on the power of federal courts to grant habeas relief, one would logically expect a reduction in the number of cases resulting in a grant of the writ. However, the Ninth Circuit has continued to grant relief in capital cases, granting the writ in two of the three AEDPA capital cases that have come before the Court. *See Visciotti v. Woodford*, No. 99-99031, 2002 WL 663777 (9th Cir. April 24, 2002) (reversed sentence); *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002) (reversed conviction); *Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001) (affirmed conviction and sentence).

In both *Benn* and *Visciotti*, the Ninth Circuit simply disagreed with the state court's decision on the claim. Despite the court's acknowledgement of the AEDPA standard of review, the Ninth Circuit has not provided deferential review to the state court adjudication of federal law.[1]

3. The Ninth Circuit Failed To Defer To The Washington Supreme Court's Decision That The Undisclosed Evidence Was Not Material Because Patrick And The Cause Of The Fire Were Not Critical To Prove Benn's Guilt.

a. Evidence Is Material Only If A Reasonable Probability Exists That The Evidence Would Have Affected The Outcome.

"[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995). The Constitution requires "disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *Strickler v. Greene*, 527 U.S. 263, 291 (1999); *Kyles v. Whitley*, 514 U.S. at 434. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682.

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[1] The Ninth Circuit has denied relief in one AEDPA capital case. However, because the circuit court found no constitutional error, the court did not consider whether the state court decision was objectively unreasonable. *Landrigan*, 272 F.3d at 1231 ("We sit to determine whether there has been error of constitutional magnitude. There has not been.").

Impeachment evidence falls within the definition of evidence favorable to the defense. *Bagley*, 473 U.S. at 676.. The failure to disclose impeachment evidence does not require automatic reversal; a finding of materiality is still required to establish a *Brady* violation. *Id.* at 676-77.

In determining whether the petitioner has established a reasonable probability of a different result, the federal court must consider the other evidence presented by the prosecution, including the presence of considerable forensic and other physical evidence and the testimony of other witnesses. *Strickler*, 527 U.S. at 293-94. In light of the other evidence, "the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 290.

b. This Court Has Traditionally Deferred To State Court Analysis Of State Law.

This Court recognizes that federal courts "usually walk on treacherous ground when we explore state law, for state courts, state agencies, and state legislatures are its final expositors under our federal regime." *Brady*, 373 U.S. at 90 (footnote omitted); *see also Jackson v. Virginia*, 443 U.S. 307, 336 n. 9 (1979) (Stevens, J., concurring in judgment) ("State judges are more familiar with the elements of state offenses than are federal judges and should be better able to evaluate sufficiency claims.").

State law defines the elements of state crimes and defenses to such crimes. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986); *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Martin v. Ohio*, 480 U.S. 228, 232 (1987). "In determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the

offense is usually dispositive. . . ." *McMillian*, 477 U.S. at 85. Similarly, the state supreme court is the ultimate expositor of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *Martin*, 480 U.S. at 235. The state supreme court is necessarily the ultimate expositor in determining whether evidence is critical to prove the elements of a state criminal offense.

In *Brady*, this Court agreed with the Maryland Court of Appeals decision that suppression of evidence violated the defendant's due process rights on the question of punishment. *Brady*, 373 U.S. at 86. The Court, however, also deferred to the state court's decision that the suppressed evidence would not have affected the determination of guilt because "'nothing in it could have reduced the appellant Brady's offense below murder in the first degree.'" *Id.* at 88 (quoting *Brady v. State*, 226 Md. 422, 430, 174 A.2d 167 (1961)). Similarly, in *Strickler*, this Court agreed the suppression of exculpatory evidence did not violate due process because the evidence did not affect the proof necessary to convict Strickler of capital murder. *Strickler*, 527 U.S. at 292.

In this case, the Washington Supreme Court determined the undisclosed evidence was not material because Patrick and the cause of the fire were not critical in proving Benn's guilt. Despite the fact that the Washington Supreme Court is more familiar with the elements of aggravated murder, and the evidence necessary to prove the crime, the Ninth Circuit failed to provide any deference to the Washington Supreme Court's analysis of state law.

c. The Ninth Circuit Failed To Provide Any Deference To The State Court Determination Of What Evidence Was Critical In Proving The Criminal Offense.

The Ninth Circuit held that Patrick and the actual cause of the fire were critical to the prosecution's case. *Benn*, 283 F.3d at 1059-60 (App. 30a-32a). The Washington Supreme Court, analyzing its own law, reached the opposite result.

The Washington Supreme Court determined Patrick was not a critical witness to the prosecution's case.[2] *In re Benn*, 134 Wash.2d at 906-08 (App. 310a-13a). Forensic evidence and testimony of other witnesses, including Benn's own brother, overwhelming demonstrated Benn's guilt. *Id.* (App. 310-13a). Also, Patrick's testimony was corroborated by other evidence. *Id.* at 937-38 (App. 372a-74a).

Applying *Kyles*, the Washington Supreme Court also reasonably determined "the cause of the fire was not critical to the insurance fraud theory." *In re Benn*, 134 Wash.2d at 900 (App. 297a).[3] The prosecution's theory focused on the fact that, after a burglary and fire in his trailer, Benn claimed a greater loss against his insurance than he had actually

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[2] The Washington Supreme Court recognized Patrick's testimony provided some of the only evidence available to support a theory of self-defense once Benn refused to testify. *In re Benn*, 134 Wash.2d at 915 (App. 327a). Impeaching Patrick, so as to convince the jury not to consider this evidence, would have undermined the defense theory. *Id.* (App. 327a)

[3] Although Benn did not have a copy of the fire marshal's report, he knew of the fire marshal's conclusions through other documents and witnesses. *In re Benn*, 134 Wash.2d at 916-17 (App. 330a-32a).

sustained. *In re Benn*, 134 Wash.2d at 917-18 (App. 333a). Items that Benn claimed were damaged in the fire or stolen in the burglary were found in Dethlefsen's home. *Id.* at 899 and 918 (App. 295a-96a and 333a). "Proving the fire was accidental would not rebut this evidence of a fraudulent insurance claim for items not destroyed." *Id.* at 918 (App. 333a). The fire marshal's report also would not have impeached Patrick's testimony. *Id.* (App. 334a).

Benn admitted to shooting both men. The evidence showed Benn shot the mortally wounded men point blank in the back of the head as they lay on the floor. The Washington Supreme Court reasonably determined that the prosecution had an overwhelming case against Benn, that Patrick and the actual cause of the fire played a small role in the prosecution's case, and that Benn had no plausible claim of self-defense. *In re Benn*, 134 Wash.2d at 895-96 (App. 287a-89a).

The evidence clearly showed that Benn, with premeditated intent, shot and killed the two men as part of a common scheme or plan. In light of this evidence, the Washington Supreme Court reasonably determined there was no reasonable probability that any undisclosed information would have altered the outcome of the trial. The Washington Supreme Court therefore reasonably concluded that no *Brady* violation occurred. Despite its references to the deferential standard of review required by 28 U.S.C. § 2254(d)(1), the Ninth Circuit failed to provide any deference to the Washington Supreme Court's analysis of its own criminal law.

The Ninth Circuit's decision in *Benn* is consistent with its resolution of the petitioner's claims in *Visciotti v. Woodford*, No. 99-99031, 2002 WL 663777 (9th Cir. April 24, 2002). The Ninth Circuit affirmed the denial of relief on petitioner' s conviction, but also affirmed the grant of habeas relief as to the petitioner's sentence of death. *Visciotti*, at *18. The Ninth Circuit first determined "The California Supreme Court's

decision concerning Visciotti's penalty phase claim was 'contrary to' Supreme Court law because it mischaracterized *Strickland's* prejudice standard." *Id.* at *8. The Ninth Circuit then determined whether "the California Supreme Court reached an erroneous result that warrants the issuance of the writ." *Id.* The Ninth Circuit found counsel's performance in the penalty phase trial was unreasonably deficient. *Id.* at *8-*16 The Ninth Circuit also found that counsel's deficient performance prejudiced the defense. *Id.* at *16-*17.

In addition to addressing the "contrary to" prong of § 2254(d)(1), the Ninth Circuit also determined that, even if the state court had correctly applied the prejudice prong of *Strickland*, the state court decision was objectively unreasonable. *Visciotti*, at *17. The Ninth Circuit rejected the California Supreme Court's determination that no prejudice resulted from counsel's deficient performance because the aggravating evidence was overwhelming. *Id.* As in *Benn*, the Ninth Circuit simply disagreed with the state court's analysis of the strength of the prosecution's evidence. The Ninth Circuit failed to provide any deference to the state court adjudication.

"'The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Strickler*, 527 U.S. at 289-90 (quoting *Kyles*, 514 U.S. at 434). A petitioner is not entitled to relief unless "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (quoting *Kyles*, 514 U.S. at 435). The Washington Supreme Court determined that the undisclosed evidence would not put the case in such a different light. The prosecution presented overwhelming evidence that Benn killed the men, Benn admitted at trial that he killed the men, and Benn could present no lawful

justification for killing the men. In light of the evidence of Benn's guilt, the Washington Supreme Court reasonably determined that Patrick's testimony and the actual cause of the fire were not material in proving Benn's guilt under Washington law. The Ninth Circuit failed to provide any deference to the state court's decision.

CONCLUSION

For the reasons stated herein the petition should be granted.

RESPECTFULLY SUBMITTED

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